In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1094

HERMAN L. WOMACK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court's refusal to admit into evidence magazines resembling their allegedly obscene publications violated due process, and that their convictions for transporting and mailing obscene matter violated their First Amendment rights and the First Amendment rights of potential recipients.

Following a jury trial in the United States District Court for the District of Columbia, petitioners were convicted on twelve counts of interstate transportation of obscene matter and three counts of mailing nonmailable matter and mailing information on how and where to obtain other ob-

scene materials, in violation of 18 U.S.C. 1461 and 1462.[1] Petitioner Womack was sentenced to concurrent terms of one to three years on each of the twelve counts charging violation of 18 U.S.C. 1462, and concurrent terms of one and a half years to four and a half years on each of the three counts charging violation of 18 U.S.C. 1461, with the sentences under 18 U.S.C. 1461 to be served consecutively to the sentences under 18 U.S.C. 1462. Petitioner Potomac News Company was fined $2,000 cumulatively on each count of the indictment for a total fine of $30,000. The court of appeals affirmed in two separate opinions on which we primarily rely (Pet. Apps. A and B).[2]

The evidence showed that petitioners had shipped by means of common carriers nine magazines to various "adult bookstores" in Baltimore, Buffalo, Cleveland, Miami and Philadelphia (Tr. 146-147, 150-151, 153-154, 156-159, 161-164, 166-168, 208-210, 212-213, 215-220, 222, 224-227, 229, 231-232, 235-236), and had mailed several "adult books" through the United States mails (Tr. 186-199).

The government offered psychiatric and artistic testimony relating to eight of the magazines seized from petitioners. Dr. John R. Cavanaugh testified that the magazines would appeal to the prurient interest of homosexuals or pedophiles (Tr. 473-476, 478-480, 484-485, 487-488), and

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[1]Petitioners originally were charged with twenty counts of violating 18 U.S.C. 1462. Six counts were dismissed on government motion when the trial commenced. Petitioners were found not guilty on two other counts.

Indicted and tried with petitioner Womack were Angela C. Grimmer and Donald F. Branca, both employees and officers of petitioner Potomac News Company. During the trial the district court granted motions for judgment of acquittal as to both these co-defendants.

[2]The court of appeals' first opinion dealt only with the evidentiary issues. The court of appeals deferred consideration of the First Amendment contention until this Court's decision in *Miller* v. *California*, 413 U.S. 15, which case was pending at the time of its earlier decision.

noted that elements of sadism and masochism were contained in some of the magazines (Tr. 478, 480-482, 525-526). He testified further that none of the magazines had any scientific value (Tr. 475, 477, 479, 482, 484, 487). Mr. Frank J. Getlein, art critic for the Washington Evening Star, testified as an expert that all of the questioned publications exceeded contemporary national community standards and had no literary or artistic value (Tr. 627-628, 630-634, 637-655).

1. Petitioners contend that the eight magazines that formed the basis of their conviction are not obscene and are entitled to First Amendment protection.

Both statutes under which petitioners were convicted have been viewed by this Court as satisfying *Miller's* tripartite test for determining whether a particular work is obscene. See *Hamling* v. *United States*, 418 U.S. 87; *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123, 130.

The Court in *Miller* also listed certain "plain examples" of the type of material that a statute could regulate, including (413 U.S. at 25):

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
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> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

As the court of appeals correctly concluded, the magazines that formed the basis of petitioners' convictions contained

material falling squarely within these categories.[3] Accordingly, distribution of these magazines was not protected by the First Amendment.

2. At trial, petitioners sought to introduce copies of thirty-five magazines, some of which had previously been declared non-obscene by this Court, and ten posters, for the purpose of allowing the jury to compare them with the magazines on which the indictment was based. The district court, finding the proffered evidence to be immaterial, refused to admit it.

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[3]The court of appeals described the subject magazines as follows:

> The eight magazines in question consist of a collection of photographs showing young boys of the adolescent and pre-adolescent age group in a state of complete or partial nudity. The photographs have been cropped and the youngsters posed in a manner which highlights and emphasizes their exposed genitalia. In several instances, most noticeably on the back covers of both *Phallic Development* magazines, the cropping has been accomplished in such a way as to show the viewer nothing more than the genitals themselves and a small portion of the surrounding pubic region. Many photographs particularly those of the older boys, depict the penis in full or partial erection. A suggestion of masochism is present in several photographs by depicting totally nude youngsters bound by ropes while another is ensnared in a net. Among those photographs known in the trade as "singles," *i.e.*, those portraying only one model, several boys are shown fondling their penises while another manually lathers his semi-erect penis with soap. Among those photographs known in the trade as "duals," *i.e.*, those portraying two models, the youngsters are seen caressing, fondling, kissing, and embracing each other. In many instances the positions of the boys indicate that oral or anal sodomy is imminent. In one photograph (*Boys Who Seduce Other Boys* p. 33) it appears that anal sodomy is ongoing.
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> Only four of the magazines contain any substantial text. They generally consist of "case histories" in which certain portions are emphasized with bold face type. These passages deal with such diverse sexual activities as fellatio, anal sodomy and masturbation. The photographs accompanying the text depict nude males embracing and fondling each other and are wholly unrelated to the text. [Pet. App. A 5a, n. 4.]

a. As the court of appeals correctly noted (Pet. App. 7a-8a), to allow the jury to consider whether magazines that had been found to be non-obscene were comparable to the magazines at issue would be tantamount to requiring the jury to interpret the effect of a previous holding as it bears on present issues—a legal task beyond the competence of the jury and basic to the function of the judge.

b. Nor was it necessary that the allegedly comparable publications be admitted for the purpose of determining prevailing contemporary community standards. This is an area in which the district court has wide discretion since, as the court of appeals observed, admission might otherwise make the trial unmanageably complex and lengthy. See also *Books, Inc.* v. *United States*, 358 F.2d 935, 939 (C.A. 1). The court of appeals correctly found that the district court had not abused its discretion in this regard, since "[m]ost of the evidence sought to be introduced was simply unsusceptible of a convincing showing of similarity to the defendants' works"[4] (Pet. App. 16a) and, in any

[4]Two of the magazines are labeled as marriage manuals and depicted heterosexual activity between adults. Another magazine portrayed heterosexual acts between adult members of different racial groups. Yet another magazine showed nude and partially nude females in various erotic poses. Petitioners also proffered an illustrated version of the Report of the President's Commission on Obscenity that contained pictures running the gamut from bestiality to normal heterosexual activity. Twenty-two other magazines and ten posters depicted adult males in various stages of nudity. Many of them portrayed scenes from the day-to-day life at nudist colonies, while others portrayed the physiques of weight lifters. In some of the nudist magazines there were photographs of young children shown in the context of daily living within the nudist community. These proffered magazines and posters were totally different from the eight magazines involved in the instant case (Pet. App. 17a).

event, petitioners could not show that the allegedly comparable magazines had in fact been accepted by the community[5] (Pet. App. 18a).

c. Finally, as the court of appeals also noted, the use of comparative evidence by expert witnesses on cross-examination is also a matter within the sound discretion of the district court. While it might be helpful for the jury to know that a particular expert witness may have an opinion about a certain comparable work that is contrary to the opinion of this Court, this must be balanced by the danger of potentially excessive trial length, complexity and unmanageability. There was no showing that the district court abused its discretion in striking the balance against admittance in the instant case (Pet. App. 20a-24a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[5]The eight remaining magazines depicted nude and partially nude young boys engaging in acts of fellatio, anal sodomy and masturbation. With respect to these magazines, petitioners failed to show a reasonable degree of community acceptance. None of these magazines has ever been declared non-obscene by this Court. In fact, petitioners' counsel stated to the trial court that so far as he knew these magazines "have not been involved in any court cases" (Tr. 675). The only evidence which petitioners proffered to show community acceptance of these magazines was the fact that as of the date of the trial no criminal charges had been brought against them (Tr. 673-675).